Supreme Court, U.S.
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85-1650

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN THE MATTER OF:
N.O.C., t/a NOBLE OIL COMPANY,

Petitioner

vs.

ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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On the Petition.

QUESTIONS PRESENTED

1. Is a prosecution of the Toxic Substances Control Act valid where the waste oil sample upon which the charges of violation are based was not a representative sample as required by the regulatory testing procedures applicable to owners and users of waste oil.

2. Whether the threshold for regulation of polychlorinated biphenyls (PCBs) was invalid in January, 1981 as a result of the decision in Environmental Defense Fund v. Environmental Protection Agency, 636 F.2d 1267 (D.C. Cir. 1980).

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Petitioner, N.O.C., t/a Noble Oil Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 11, 1985.

OPINIONS BELOW

Petitioner requests review of the judgment order of the United States Court of Appeals for the Third Circuit, reproduced in the Appendix at page 118a infra., affirming the final order of the Administrator of the United States Environmental Protection Agency.

The Final Decision and Order of the Chief Judicial Officer is 106a reproduced in the Appendix at page and 114a infra. The Initial Decision and Decision Denying Motion to Reopen the Hearing, affirmed in their entirety by the Final Decision are reproduced in the Appendix at page 1a and 36a infra., respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 11, 1985.

This petition for certiorari has been filed within 90 days of the date of that judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), which states:

> "cases in the courts of appeal may be reviewed by the Supreme Court...
>
> (1) by writ of certiorari granted upon a petition of any party to any civil or criminal case before or after rendition of judgment or decree..."

STATUTES AND REGULATIONS INVOLVED

1. Toxic Substances Control Act, 15 U.S.C. §§2614, 2615(a)

§2614. Prohibited acts

It shall be unlawful for any person to--

> (1) fail or refuse to comply with (A) any rule promulgated or order issued under section 2603 of this title, (B) any requirement prescribed by section 2604 or 2605 of this title, or (C) any rule promulgated or order issued under section 2604 or 2605 of this title;
>
> (2) use for commercial purposes a chemical substance or mixture which such person knew or had reason to know was manufactured, processed, or distributed in commerce in violation of section 2604 or 2605 of this title, a rule or order under section 2604 or 2605 of this title, or an order issued in action brought under section 2604 or 2606 of this title;
>
> (3) fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information, or (C) permit access to or copying of records, as required by this chapter or a rule thereunder; or

(4) fail or refuse to permit entry or inspection as required by section 2610 of this title.

§ 2615. Penalties

(A) Civil.-(1) Any person who violates a provision of section 2614 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 of this title.

Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce and Use Prohibitions. 40 C.F.R. §761.

40 C.F.R. §761.1(b) (1981)[1]

[1] The PCB regulations were recodified and renumbered in 1982 and amended in part in 1984. The references throughout this petition are to the regulations as they were numbered at the time of the hearing. 40 C.F.R. §761.1(b) is now codified at 40 C.F.R. §761.1(b)(1984).

Subpart A - General

§761.1 Applicability.

(b) This part applies to all persons who manufacture, process, distribute in commerce, use, or dispose of PCBs or PCB Items. Unless it is otherwise specifically provided, the terms PCB and PCBs are used in this rule to refer to any chemical substances and combinations of substances that contain 50 ppm (on a dry weight basis) or greater of PCBs, as defined in §761.2(s), including any byproduct, intermediate, or impurity manufactured at any point in a process. Any chemical substances and combinations of substances that contain less than 50 ppm PCBs because of any dilution shall be included as PCB and PCBs unless otherwise specifically provided. Substances that are regulated by this rule include, but are not limited to, dielectric fluids, contaminated solvents, oils, waste oils, heat transfer fluids, hydraulic fluids, paints, sludges, slurries, dredge spoils, soils, materials contaminated as a result of spills, and other chemical substances or combination of substances, including impurities and byproducts.

40 C.F.R. §761.10(g)(2)(1981)[2]

> (2) Owners or users of waste oil may use the following procedures to determine the PCB concentration of waste oil:
>
> (i) Waste oil from more than one source may be collected in a common container, provided that no other chemical substances or mixtures, such as non-waste oils, are added to the container.
>
> (ii) For purposes of complying with the marking and disposal requirements, representative samples may be taken from either the common container or individual containers to determine the PCB concentration except that if any PCBs at a concentration of 500 pm or greater have been added to the container then the total container contents must be considered as having a PCB concentration of 500 ppm or greater for purposes of complying with the disposal requirements of this subpart. For purposes of this subparagraph, representative samples of waste oil are either samples taken in accordance with American Society of Testing and Materials D-923 method or samples taken from a container that has been thoroughly mixed in a manner such that any PCBs in the container are uniformly distributed throughout the liquid in the container.

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[2] 40 C.F.R. §761.10(g)(2) is now codified at 40 C.F.R. §761.60(g)(2)(1984).

STATEMENT OF THE CASE

This action was instituted by the United States Environmental Protection Agency (EPA) pursuant to the Toxic Substances Control Act (TSCA) 15 U.S.C. §2615(a).

Petitioner Noble Oil Company (Noble) was charged with three violations of the regulations governing polychlornated biphenyls (PCBs), 40 C.F.R. §761.1 et seq., specifically failure to mark a PCB container, failure to have a Spill Prevention Control and Countermeasure Plan and failure to maintain records of each batch of PCBs added to the container. Penalties were assessed against Noble for $15,000, $15,000 and $10,000 respectively.

The Complaint issued by the Director of the Enforcement Division, United States Environmental Protection

Agency (EPA), Region II was issued on or about January 19, 1981. The Complaint was premised upon the EPA allegation that the contents of one of Noble Oil's tanks contained PCB's in a concentration of 76 parts per million (ppm). Noble contended and still maintains that the PCB concentration in the tank did not exceed the TSCA limit of 50 ppm, placing in issue, the validity of EPA's techniques for sampling, testing and analyzing the contents of the tank in question.

On February 9, 10, and 11, 1982 a hearing was held before the Honorable Spencer T. Nissen, Administrative Law Judge in Philadelphia, Pennsylvania. On December 3, 1982 an Initial Decision issued finding Noble in violation of TSCA as charged, and imposing a $40,000 civil monetary penalty. On

January 19, 1983 Noble filed a motion to reopen the hearing based upon scientific data which first became available subsequent to the hearing. The motion to reopen was denied on May 16, 1983 and on June 3, 1983 Noble filed a notice of appeal to the Judicial Officer of the Environmental Protection Agency seeking review of the initial decision in its entirety as well as the decision denying Noble's motion to reopen the proceedings.

On February 28 1985, the Chief Judicial Officer of the EPA, Robert L. McCallum issued a Final Decision affirming in all respects the findings of Judge Nissen and upholding the imposition of the $40,000 civil monetary penalty. Noble thereafter filed a petition for review with the United States Court of Appeals for the

Third Circuit on March 27, 1985, appealing from the entirety of the ruling of the Administrator of the EPA. Oral argument was heard on December 5, 1985 and on December 11, 1985 a judgment order affirming the final order of the Administrator of the Environmental Protection Agency was entered.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to determine whether the Environmental Protection Agency is held to the same standard as owners and users of waste oil for purposes of testing the concentration of PCBs in waste oil

The prosecution of Noble for violations of the EPA regulations as charged is valid only if EPA proved by a preponderence of the evidence that the tank from which sample 57970 was taken contained waste oil with a concentration of PCBs greater than 50 ppm. 40 C.F.R. §§22.24; 761.20; 761.42(c)(7)(ii) and 761.42(c)(8). Noble was charged with violating the marking regulation (40 C.F.R. §761.20 and two related storage regulations (40 C.F.R. §§761.42(c)(7)(ii) and (c)(8)). The marking and storage regulations, however, do not apply to Noble unless the tank from which the sample in question was taken, Tank

No. 4 at the Noble facility, contained PCBs in a concentration of 50 ppm or greater. 40 C.F.R. §761.1(b).

Part 761 of Title 40 of the Code of Federal Regulations applies to:

> ...all persons who manufacture, process, distribute in commerce, use or dispose of PCBs or PCB Items. Unless it is otherwise specifically provided, the terms PCB and PCBs are used in this rule to refer to any chemical substances and combinations of substances that contain 50 ppm (on a dry weight basis) or greater of PCBs as defined in §761.2(s)....
>
> 40 C.F.R. §761.1(b).

A PCB Item for purposes of the regulations promulgated pursuant to TSCA is:

> any PCB Article, PCB Article container, PCB container or PCB equipment that deliberately or unintentionally contains or has as part of it any PCB or PCBs at a concentration of 50 ppm or greater.
>
> (40 C.F.R. §761.2(x).)

Thus, Noble's alleged failure to mark a 10,000 gallon underground storage tank as a PCB container, to have a Spill Prevention Control and Countermeasure Plan and to maintain records showing the quantity and date PCBs were added to the container, are not violatons as charged unless Tank No. 4 was being used to store waste oil with a concentration of PCBs equal to or exceeding 50 ppm. Accordingly EPA's contention that the contents of Tank No. 4 had a concentration of PCBs of 76 ppm is the single assertion upon which each charge of violation of the regulations is based. Noble maintains that the contents of Tank No. 4 did not have a concentration of PCBs in an amount of 50 ppm or greater and therefore, denies that the regulations Noble allegedly violated apply to the

contents of Tank No. 4.

Included in the regulations promulgated pursuant to authority vested in the EPA by TSCA is a set of guidelines pertaining to testing procedures the regulated community may use to determine the concentration of PCBs in various liquids. 40 C.F.R. §761.10(g). The sampling methods owners or users of waste oil such as Noble, may employ to determine the PCB concentration of waste oil are set forth in 40 C.F.R. §761.10(g)(2)(ii). For purposes of complying with the marking and disposal requirements of part 761, Title 40 of the Code of Federal Regulations, representative samples may be taken from either the common container or individual containers to determine PCB concentrations. Representative samples of waste oil are defined as

samples taken in accordance with American Society of Testing and Materials (ASTM) D-923 method or samples taken from a container that has been thoroughly mixed in a manner such that any PCBs in the container are uniformly distributed throughout the liquid in the container. 40 C.F.R. §761.10(g)(2)(ii).

Stephen Ward, one of the EPA employees responsible for inspecting Noble's facility on July 15, 1980, extracted samples from each tank on the premises, including the sample from Tank No. 4 upon which the charges of violation are based, by placing a 40 ml. glass vial inside the tanks thereby penetrating the oil in the tank approximately an inch and one half to two inches. Ward did not stir or mix the oil in Tank No. 4 in a manner such that any PCBs in the tank

would be uniformly distributed throughout the waste oil in the tank. Noble presented an expert witness at the hearing before Judge Nissen who testified that to ensure uniform distribution of PCBs throughout the liquid contained in Tank No. 4, at the least, a large hand held stirrer would be needed to adequately mix the tank's contents and that if the viscosity or volume of material was large enough, the contents of the tank would have to be mechanically mixed before a representative sample could be taken.

As the EPA inspectors who visited the Noble facility testified that they did not mix the contents of Tank No. 4 prior to taking sample 57970, the sample is not representative unless the sampling method used conforms with the ASTM D-923 method. The ASTM D-923

publication emphasizes the importance of obtaining a representative sample in order to evaluate the quality of the product. With regard to techniques involved in obtaining representative samplings D-923, ¶3.2 states:

> In most cases the detection of contaminants that are not ordinarily dispersed uniformly through the liquid being sampled, such as water or solid particles, necessitates taking samples at specific locations where the contaminants are likely to be found. For a liquid having a specific gravity less than unity, water and some other impurities are most likely to be found at the bottom, whereas in the case of a liquid having a specific gravity greater than unity these impurities are most likely to be found at the surface.

When taking oil samples in particular, ASTM D-923 ¶11.6 demands that samples be extracted from the bottom of the container. The ASTM publication states that:

> Unless otherwise specified oil samples shall be taken from the bottom of the liquid container. For drums, cans and small tanks, etc., the sampling device shall be so designed that the sample shall be obtained a distance of 1/8 inch (3.2 mm) from the bottom of the container while for large tanks, tank trucks and tank cars, this distance shall be within 1/2 inch (12.7 mm) of the bottom.

The testing procedure employed by Ward to extract sample 57970, skimming the top of the tank with a glass vial, fails to comport with the mixing requirements set forth in 40 C.F.R. §761.10(g)(2)(ii) or the ASTM D-923 method. The "method" the inspector used precluded extracting a representative sample from Tank No. 4. Despite EPA's failure to comply with the testing procedures the regulations encourage the regulated community to use, Judge Nissen found that Tank No.

4 contained PCBs at a concentration of 76 ppm. The Chief Judicial Officer affirmed the Initial Decision by adopting and incorporating by reference all findings of fact, conclusions of law and reasons therefore, in the initial decision. The United States Court of Appeals for the Third Circuit affirmed the conclusion that Tank No. 4 had a concentration of PCBs of 76 ppm by affirming the final order of the EPA by a Judgment Order.

In TSCA violation cases initiated subsequent to the charges filed against Noble, the issue of the necessity of obtaining a representative sample in accordance with the testing procedures set forth in the regulations has been addressed. In In re Electric Service Company, TSCA Appeal No. 82-2, Final Decision

January 7, 1985, the Chief Judicial Officer held that a representative sample was not essential where the charges were for violation of the disposal regulations, as proof of disposal violations hinged on proof of uncontrolled discharge of PCBs and not upon the quality or condition of a larger body of material. Id. at page 17. However the Chief Judicial Officer stated that where proof of a violation depends upon producing evidence that accurately describes some quality or condition of a larger body, for example its PCB concentration level, a representative sample is essential, for no inferences about the larger body can be drawn from a mere grab sample. Id.

The prosecution and imposition of a civil monetary penalty of $40,000.00 against Noble is

contingent upon proof that the waste oil contained in Tank No. 4 had a concentration of PCBs equal to or greater that 50 ppm. The burden of proof is upon EPA to establish that the contents of the tank alleged to be an unmarked PCB container, was storing waste oil with a concentration of PCBs equal to or exceeding 50 ppm. In the Matter of Robert Ross and Sons, Inc., TSCA Appeal No. 82-4, Final Decision April 4, 1984, page 8, note 12.

Desite testimony from the EPA employees who inspected the Noble facility that they took what amounted to a grab sample as opposed to a representative sample, Noble was found to have violated the regulations as charged. Judge Nissen rejected the arguments that: 1) representative samples were necessary to prove the violations charged, and 2) in

attempting to establish a violation of regulations based upon the quality of the contents of a container EPA must be held to the same standard as owners and users. However, Judge Nissen only days before the hearing in this matter issued an initial decision in a TSCA case holding that representative samples were necessary to pove disposal violations, and that EPA, in attempting to establish a violation, must be held to the same standard as users and owners of waste oil. In re the Matter of Robert Ross and Sons, Inc., TSCA Appeal No. 82-4, Initial Decision, February 1, 1982, page 26-27.

EPA failed to sustain its burden of proving by a preponderence of the evidence that a representative sample was taken from Tank No. 4. This, however, was not the finding of

the Administrative Law Judge. Judge Nissen by sustaining the charges of violation held, contrary to his decision in In re the Matter of Robert Ross and Sons, Inc., supra, that EPA was not required to abide by the standards to which the regulated community is held when establishing violations contingent upon the quality of the material in question. Judge Nissen, in essence required EPA to meet a less rigorous burden of proof than required by TSCA and accompanying regulations. Having relaxed the burden of proof EPA was required to sustain to prove the violations charged, Judge Nissen went on to find that EPA proved by a preponderence of the credible evidence, the allegations charged.

Whether sample 57970 was representative of the material stored

in Tank No. 4 or not, the decision to deny Noble's motion to reopen the proceedings for the limited purpose of putting into the record new scientific data unknown to the parties, their witnesses or the scientific community at the time of the hearing, was reversable error. Noble moved to reopen the hearing so that, through the only expert who testified at the hearing, Mr. Ziegler, evidence concerning analytical variability or standard deviation could be presented. The evidence Noble was prepared to introduce in the event the motion was granted, would have demonstrated that a concentration of PCBs in waste oil must be greater that 84 ppm before it can be considered a statistically valid violation of the 50 ppm cutoff. Data from additional studies conclusively demonstrate that the

concentration of PCBs in a sample must exceed 105 ppm before the TSCA limit of 50 ppm is exceeded.

Application of the above standards to the 76 ppm determination by EPA would require reversal of the finding that the level of PCBs in sample 57970 exceeded the threshold and rendered applicable to the contents of Tank No. 4 the regulations Noble allegedly violated. In addition to extracting an invalid sample, EPA analysis was inadequate as it failed to take into consideration principles of standard deviation in the process of determining the level of PCBs contained in sample 57970. The denial of the motion to reopen the proceedings further reduced the possibility that EPA would be held to the standards to which it holds the regulated community. The failure to

reopen was an abuse of the administrative law judge's discretion as injustice would, and did result. Duval Corporation v. Donovan, 650 F.2d 1051 (9th Cir. 1981); Trujillo v. General Electric Co., 621 F.2d 1084 (10th Cir. 1980). Thus, the anaylsis of the sample taken from Tank No. 4 was as inadequate as the sampling procedures employed by EPA. The determination that the concentration of PCBs in Tank No. 4 exceeded the threshold is not supported by the proponderence of the evidence as required if the charges of violation are upheld.

Whether an agency is held to the standards to which it holds the regulated community is a question involving due process considerations which should be addressed by this Court. Utah International Inc. v.

United States Department of the Interior, 553 F. Supp. 872 (D. Utah 1982). By including in its regulatory scheme testing procedures owners and users of waste oil are encouraged to use to determine whether the complex and comprehensive regulatory scheme applies to a container of waste oil, but failing to follow its suggested testing procedures when inspecting the Noble facility, EPA violated Noble's right to due process. By using the improperly procured sample as a basis for charges of violation and subsequent prosecution under TSCA. EPA, denied Noble its right to due process of the law as provided in the United States Constitution, Amendments Five and Fourteen.

2. Certiorari should be granted to determine whether the 50 ppm regulatory threshold for PCBs was valid at the time of the filing of the complaint against Noble.

A condition precedent to the application of regulations which Noble was charged with violating is the determination that sample 57970 taken from the site, contained PCBs in a concentration equal to or greater than 50 ppm. 40 C.F.R. §761.1(b). With one exception, materials such as waste oil with concentrations lower than 50 ppm are exempt from the TSCA regulatory scheme. However, the complaint against Noble, filed on January 19, 1981, was filed at a time subsequent to the date the District of Columbia Circuit in Environmental Defense Fund v. Environmental Protection Agency, (EDF), 636 F.2d 1267 (D.C. Cir. 1980), declared the 50 ppm threshold invalid, and prior to

the date the mandate of the case was stayed. As there was no threshold in effect at the time the complaint was filed against Noble, the prosecution premised upon the existence of a regulatory threshold of 50 ppm is invalid.

At the opening of the February, 1982 hearing Noble moved to dismiss the complaint on the basis that the 50 ppm standard was, at the time of the filing of the complaint, invalidated by the holding in Environmental Defense Fund v. Environmental Protection Agency, 636 F.2d 1267. Noble's applicaton was denied by Judge Nissen on grounds that the District of Columbia Circuit granted a stay of the EDF mandate, that the Court addressed the validity of the "Ban Regulations" only, and that the EDF Court invalidated the 50

ppm threshold because the cutoff did not comport with Congressional intent that all commercial activities involving PCBs be included within the regulations in the absence of compelling evidence such inclusion was not feasible. Initial decision at page 7, Appendix at page 15a-17a, infra.

Judge Nissen and the courts which have subsequently affirmed the initial decision failed to take into consideration the fact that the complaint against Noble was filed one month prior to the District of Columbia Circuit's stay of the mandate and two and one half months after the judgment in the case was entered. The February 12, 1981 stay of the mandate of the EDF judgment does not support or favorably impact upon the prosecution challenged herein as the mandate was in full force and effect

at the time the complaint against Noble was filed as the stay was not granted retroactively.

The EDF Court concluded that the 50 ppm threshold limiting the applicability of the PCB regulations was unsupported by factual evidence on the record. The lack of evidence on the record prompted the EDF Court to hold that the standard was invalid and to remand the case to the Agency so that new hearings and proceedings could be instituted and new standards adopted. The Court's suggestions that the 50 ppm standard might not have been stringent enough, is merely dicta and as such does not alter the Court's holding that the threshold as it existed at all times material hereto was the result of invalid administrative rule making due to a lack of sufficient factual basis in

the record for establishing such a standard. EDF, 636 F.2d at 1283. Because there was no valid administratively adopted standard upon which to base a prosecution of Noble, the prosecution should have been dismissed. By striking down the threshold which acted in effect as a definition of PCBs for purposes of the regulations Noble is charged with violating, the decision in EDF invalidates the prosecution of Noble. EPA's eventual determination that the 50 ppm threshold was the appropriate minimum concentration of PCBs subject to the regulations does not alter the fact that the complaint was filed at a time when a valid standard on which to base a charge of violation did not exist.

It is well settled in the Third Circuit that operative sections

of a statutory scheme must fall where they are dependent upon a statutory definition which is determined to be unconstitutional. Hamar Theaters, Inc. v. Cryan, 365 F. Supp. 312 (D.N.J. 1973), vacated on other grounds, 419 U.S. 1085, 95 S. Ct. 670, 42 L. Ed.2d 675 (1974); modified 390 F. Supp. 510 (D.N.J.) 1975. The section defining PCBs, 40 C.F.R. 761.1(b) refers to 40 C.F.R. §761.2(s) which in turns cites 40 C.F.R. §761.2(x) for purpose of defining a PCB Item, a definition which includes PCB containers. A PCB container, an item containing PCBs at a concentration of 50 ppm or greater, being inoperative at the time the complaint against Noble was filed, renders invalid the charge that Noble failed to mark Tank No. 4 as a PCB container. The remaining two charges,

failure to have a Spill Prevention Control and Countermeasure Plan, and failure to maintain records showing the quantity and date PCBs were added to what is alleged to be PCB container must fall due to the fact that EPA had neither a valid definition of PCBs to which the regulation applied, nor a valid definition of a PCB container when the complaint against Noble was filed.

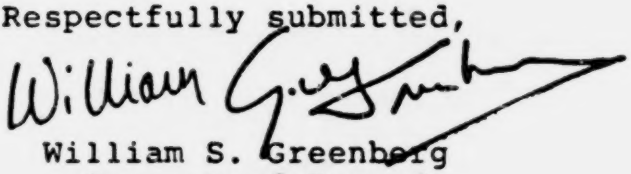
EPA has maintained throughout these proceedings that the EDF decision applies only to the "Ban Regulations", 40 C.F.R. §761.30. The so-called "Ban Regulations" however did not contain an independent standard or definition of PCBs apart from the threshold found in Subpart A, 40 C.F.R. 761.1(b), the Subpart entitled "General." Accordingly, the 50 ppm standard, if invalid for

purposes of Subpart D, the ban regulations, is necessarily invalid for Subparts B and C, the marking and disposal regulations. Only by making the most convoluted arguments of statutory construction could it be concluded that subpart A could be stricken for purposes of one subpart due to an insufficient factual basis on the record, but be upheld for the remaining subparts of the regulatory scheme. This Court should grant certiorari to determine the effect of the District of Columbia Circuit's decision in Environmental Defense Fund v. Environmental Protection Agency upon EPA proceedings initiated during the period where there was no valid constitutionally sound or enforceable cutoff regulation or definition of PCBs in effect.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

By: 

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Dated: March 7, 1986

APPENDIX A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
N.O.C., Inc.,	)	Docket No.
T/A Noble Oil	)	II-TSCA-PCB-
Company,	)	81-0105
Respondent	)	

1. Toxic Substances Control Act - PCBs - Regulatory Limit - Because of definition of PCB or PCBs as any chemical substances or combinations of substances containing 50 ppm (on a dry weight basis) or greater PCBs (40 CFR 761.1(b)), sample drawn from top of tank of waste oil and shown to contain 76 ppm PCBs was sufficient to establish tank as a PCB container (40 CRF 761.2(v)) as a matter of law and representative

sample in scientific sense was not required.

2. Toxic Substances Control Act - PCBs - Dilution - Testing Procedures - Provision of 40 CFR 761.1(b) that any chemical substances and combinations of substances that contain less than 50 ppm PCBs because of any dilution shall be included as PCBs can be reconciled with testing procedures in 40 CFR 761.10(g), which of necessity contemplate some dilution, by reading preamble (44 FR 31520-21, May 31, 1979) into cited section so that "batch testing" is only applicable to dielectric fluids or waste oils otherwise assumed to contain between 50 ppm and 500 ppm PCBs.

3. Toxic Substances Control Act - Rules of Practice - Burden of Proof - Although Complainant has burden of

establishing all elements of violation charged by a preponderance of the evidence (40 CFR 22.24), where Complainant established that sample drawn from top of tank of waste oil contained PCBs at a concentration of 76 ppm, intra-liquid stratification theory advanced by Respondent was in the nature of an affirmative defense and burden was on Respondent to demonstrate that concentration of PCBs in top of tank was due to intra-liquid stratification of PCBs at concentrations below 50 ppm.

4. Toxic Substances Control Act - Rules of Practice - Burden of Proof - Determination of Penalty - Although under Section 22.24 of Rules of Practice Complainant has burden of

demonstrating that proposed penalty is appropriate, where complaint alleged that proposed penalty was based upon nature, circumstances, extent and gravity of violations alleged in complaint and upon Respondent's ability to pay and it appearing that the assessment was in accordance with previously issued Agency guidelines for the assessment of civil penalties under TSCA (45 FR, No. 177, September 10, 1980, at 59770) and Respondent having neither controverted these allegations in its answer or proffered any evidence relating thereto, proposed assessment would be presumed to be appropriate and would be imposed.

Appearances for Respondent:

William S. Greenberg

John B. Prior, Jr.

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Greenberg, Kelley & Prior

Attorneys at Law

Trenton, New Jersey

Appearance for Complainant:

Gregory T. Halbert, Esq.

Enforcement Division

U.S.E.P.A., Region II

New York, New York

Initial Decision

by

Administrative Law Judge

Spencer T. Nissen

This is a civil penalty proceeding under Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)). The proceeding was commenced by a complaint, issued by the Director of the Enforcement Division, EPA Region II on January 19, 1981, charging

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Respondent[1/] with violations of the regulations concerning polychlorinated biphenyls (PCBs), 40 CFR Part 761, specifically failure to mark a waste oil tank as a PCB container (40 CFR 761.20), failure to have a Spill Prevention Control and Countermeasure (SPCC) Plan (40 CFR 761.42 (c)(7)(ii)) and failure to maintain records showing the quantity and date, PCBs were added to the container (40 CFR 761.42(c)(8). A penalty of $15,000 for each of the first two violations and $10,000 for the third violation for a total of $40,000 was proposed to be assessed against Respondent. Respondent answered, admitting that the

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1/ At the time the complaint was issued, Respondent operated under the name of Noble Automotive Chemical and Oil Company.

tank in question did not have a PCB mark, that Respondent did not have a SPCC Plan and did not maintain PCB batch records. Respondent, however, denied that the tank in question was a PCB container and denied that a SPCC Plan and PCB batch records were required, asserting that the PCB concentration of the tank in question did not exceed 50 parts per million (ppm), thus placing in issue the validity of the EPA sampling and test showing that the tank in question contained PCBs at a concentration of 76 ppm.

A hearing on this matter was held in Philadelphia, Pennsylvania during the period February 9-11, 1982.

Based on the entire record including proposed findings and conclusions of the

parties,[2/] I find that the following facts are established.

Findings of Fact

1. Respondent, N.O.C., Inc., trading as Noble Oil Company, operates a facility at Route 206, Vincentown, New Jersey, where it buys and sells waste oils. Waste oils handled by Respondent appear to be primarily motor oils.

2. At the facility mentioned in finding 1, Respondent maintains six underground tanks for the storage of waste oil.

3. On July 15, 1980, representatives of Complainant, Mr. Stephen Ward and Dr. Arthur Gevirtz, conducted an inspection of Respondent's facility, drawing samples from each of the six

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2/ Proposed findings not accepted are either rejected or considered to be unnecessary to the decision.

tanks. Duplicates of these samples were left with Respondent's representative, Mr. Leonard Grungo, who identified himself as "owner."

4. The sample from Tank No. 4 was collected by simply opening the cover over the port and the inspector, Stephen Ward, inserting a 40 ml vial into the tank with a gloved hand, the oil in the tank being within a few inches of the top. Samples from the other five tanks were collected in a similar manner.

5. Mr. Grungo informed Mr. Ward that the capacity of Tank No. 4 was 10,000 gallons.

6. Prior to inserting the vial into Tank No. 4, a blue label was affixed to the vial on which Mr. Ward wrote "Noble 57970 PCB's 7/15/80."

7. After removing the vials from each tank the vials were wiped clean with "chem

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whites," a material like kleenex.

8. Samples drawn from the six tanks were identified by sample numbers 57967 through 57972.

9. The vials were sealed with teflon caps and placed in plastic bags (three vials per bag), the bags being placed in a lined tool box, which was padlocked and placed in the trunk of the inspectors' car, which was also locked.

10. The samples were delivered to the EPA laboratory at Edison, New Jersey at 2:25 p.m. on July 15, 1980. The laboratory was requested to test the samples for PCBs.

11. The samples were analyzed for the presence of PCBs on July 22, 1980, the test of Sample 57970 from Tank No. 4 revealing PCBs at a concentration of 76 ppm.

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12. Analysis of the samples referred to in the preceding findings was accomplished by Mr. George Karras, an EPA chemist, who used a silica gel cleanup procedure and a gas chromatograph with an electron capture detector to conduct the test.

13. Mr. William Ziegler, a chemist and an expert witness for Respondent,[3/] testified that PCBs had a tendency to stratify. He further testified that in analyzing oil samples for PCBs he would prefer to use a gas chromatograph with Hall Electrolytic Conductivity Detector rather than an electron capture detector, because

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3/ Although all testimony by Mr. Ziegler concerning a sample taken at Respondent's facility on January 22, 1982, and the testing thereof, was withdrawn, his testimony as an expert was uneffected thereby.

the former was halogen specific and would not respond to interferences as would the latter detector.

14. Respondent was notified of the results of the inspection by letter, dated September 16, 1980.

15. Respondent has conceded that Tank No. 4 did not bear the PCB mark (40 CFR 761.20), that Respondent did not have a Spill Prevention Control and Countermeasure (SPCC) Plan (40 CFR 761.42(c)(7)(ii)) and did not have or maintain records showing dates and quantities of PCBs added to the container (40 CFR 761.42(c)(8)).

16. There is no evidence in the record of Respondent's financial condition or prior history of compliance with the Act.

Conclusions

1. Analysis of Sample No. 57970 drawn from

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Tank No. 4 at Respondent's facility on July 15, 1980, establish that it contained PCBs at a concentration of 76 ppm.

2. Tank No. 4 was a PCB container as defined in 40 CFR 761.2(v).[4/]

3. Tank No. 4 not having a PCB mark as required by 40 CFR 761.20 on July 15, 1980, Respondent was in violation of the cited regulation.

4. Respondent's failure to have a Spill Prevention Control and Countermeasure (SPCC) Plan in effect on July 15, 1980, constituted a violation of 40 CFR 761.42 (C)(7)(ii).

4/ A PCB container is defined as follows:

"(v)'PCB Container' means any package, can, bottle, bag, barrel, drum, tank, or other device that contains PCBs or PCB Articles and whose surface(s) has been in direct contact with PCBs." (40 CFR 761.2(v)).

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5. Respondent's failure to maintain records showing dates and quantities of PCBs added to the container constituted a violation of 40 CFR 761.42(c)(8).

6. Respondent having violated 40 CFR 761.20, 761.42(c)(7)(ii) and 761.42(c)(8) is liable for a civil penalty, Section 16, TSCA (15 U.S.C. 2615).

Discussion

Respondent's first argument is that the decision of the Court of Appeals, Environmental Defense Fund v. EPA, 636 F. 2d 1267 (D.C. Cir., 1980), which invalidated, inter alia, the 50 ppm threshold for regulation of PCBs under Section 6(e) of the Act precludes prosecution of the instant proceeding against Respondent.[5/]

5/ Post-Trial Memorandum at 13. Revised regulations responsive to the Court's decision were promulgated on October 12, 1982 (47 FR No. 204, at 46980, et seq., October 21, 1982).

This argument is patently without merit. In the first place, the petitioners' challenge in that case was to the so-called "ban regulations" (40 CFR 761.1(b), 1979) and not to the "disposal" and marking regulations here involved. 40 CFR 761, Subparts B, C, Annex III & V; 636 F. 2d at 1269, footnote 3. Secondly, the Court's invalidation of the 50 ppm threshold for regulation of PCBs was for the reason that there was no substantial evidence in the record to support such a cutoff and that absent such evidence, EPA had not justified such a limitation, the statute not containing any such threshold. In other words, the 50 ppm cutoff was invalidated not because it was too stringent, but because it was considered not to comport with Congressional intent that all commercial activities involving

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PCBs be included within the regulations in the absence of compelling evidence such inclusion was not feasible. Under such circumstances, it is not logical to argue that invalidation of the 50 ppm cutoff also operated to preclude enforcement of the regulations as to concentrations above the cutoff.

Thirdly, any doubts that the Court intended that the regulations involving PCBs in concentrations above 50 ppm were to remain in effect pending promulgation of revised regulations more fully in accord with Congressional intent or the presentation of reasons why more stringent regulations could not be adopted or that the benefits of regulation would be trivial, have been laid to rest by the stay of its mandate granted by the Court (46 FR 27615, May 20, 1981). An

extension of the stay was granted on April 9, 1982.

Next, Respondent argues that the sample drawn on July 15, 1980 was not representative of the contents of Tank No. 4 and that Complainant has not proven its charge that the tank contained PCBs in excess of 50 ppm (Post-Trial Memorandum at 21, et seq.). Respondent argues that a representative sample is required by EPA's own regulations, citing 40 CFR 761.10(g)(2)(ii). Complainant contends that the cited section of the regulation is applicable to "batch testing," i.e., the commingling of mineral oil dielectric fluid or waste oil from several transformers or containers assumed to contain between 50 and 500 ppm PCBs and is solely intended to preclude the necessity for separate tests

of oil from each container (Opening Brief at 13, et seq.). Complainant emphasizes that the prohibition against dilution has not changed (44 FR No. 106, at 31520-21, May 31, 1979).

The preamble to the regulation (40 CFR 761.10(g)) supports Complainant's position and provides in pertinent part:

"E. Batch Testing of Mineral Oil Dielectric Fluid

Testing of mineral oil dielectric fluid and waste oil from sources that are otherwise assumed to contain PCBs at a concentration between 50 ppm and 500 ppm can be performed on samples taken from collection tanks ("batch testing"). This is permitted so that oils from multiple sources can be collected and tested without requiring a separate test of each transformer each

time a disposer wants to evaluate his disposal options.

The prohibition against dilution, however, has not changed. The new testing option does not permit the deliberate dilution of the collected oil (assumed to contain PCBs above 50 ppm) with PCB-free or low-PCB fluids to reduce the concentration of PCBs in the resultant mixture below 50 ppm. Further, the option does not permit the deliberate addition of PCB wastes with concentrations greater than 500 ppm to the tank in order to avoid the more stringent disposal requirements for high-concentration wastes. If such high-concentration wastes are added to the tank, then the entire tank contents must be disposed of in compliance with requirements for wastes containing 500 ppm PCBs or

greater, even if a sample of the aggregate tank contents reveals a concentration below 500 ppm. In this circumstance, the tank contents cannot be used as dielectric fluid; the tank contents must be disposed of in a high temperature incinerator." (44 FR at 31520-21)

Viewed in the light of the quoted language from the preamble, the regulation on testing procedures (40 CFR 761.10(g)) is applicable only to mineral oil dielectric fluid or waste oil assumed to contain PCBs at a concentration between 50 ppm and 500 ppm. As applied to transformers, this assumption [6/] and the emphasis in the

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6/ See the discussion on transformers at 44 FR 517.

preamble on deliberate dilution are certainly reasonable. The regulation does not contain any such presumption. It is, however, clear that 761.10(g)(1) is applicable only to mineral oil dielectric fluid transformers.

Respondent, of course, does not rely on 761.10(g)(1), but on 761.10(g)(2) which is applicable to waste oil. There does not appear to be any basis for an assumption that such oils contain PCBs at a concentration between 50 ppm and 500 ppm or at any other level. Complainant emphasizes that 761.10(g)(1) and (2) are applicable to batch testing. However, if it be assumed that the contents of Tank No. 4 were obtained from several sources and the nature of Respondent's business would seem to make this

assumption reasonable,[7] then Respondent would appear to be within the ambit of 761.2(i) and (ii) provided no other chemical substances or mixtures or PCBs having a concentration of 500 ppm or greater were added to the tank. It would seem to be anomalous indeed that Respondent can use 761.10(g)(2) for the purpose of testing waste oil for compliance with regulatory requirements, but that Complainant is under no similar obligation for enforcement purposes. This anomaly disappears if 761.10(g) is, as Complainant contends, applicable only to dielectric fluid or waste oils assumed to contain PCBs having a concentration between 50 ppm and 500 ppm.

7/ Mr. Grunço testified that Respondent purchases oil from distributors and waste oil collectors, including gasoline stations and automobile dealers (Tr. 293).

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Complainant cites and relies on Yaffe Iron and Metal Company, TSCA Docket No. VI-IC, Initial Decision (March 27, 1981), Final Decision, TSCA Appeal No. 81-2 (August 9, 1982).[8/] In Yaffe it was held that where tests on a sample revealed PCBs in concentrations in excess of 500 ppm, the definition of a PCB mixture (40 CFR 761.2(w), 1978) made the barrel from which the sample was drawn a PCB container (40 CFR 761.2(u)) as a matter of law and that arguments as to whether the sample was representative and whether the fact that a dilutent of the sample, in that case water, had leaked from the sample container made the test results unreliable were not relevant.

8/ The final decision in Yaffe was issued after the close of the briefing period herein.

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Respondent points out that the definition of a PCB mixture held to be controlling in Yaffe is not contained in the regulations pertinent here (40 CFR 761 (1980), 44 FR 31542, May 31, 1979) and that, in any event, Yaffe is distinguishable because in that case the container was open and subject to dilution by, inter alia, rain-water, while in the present case the tank is underground, no such dilution was possible and there is no other evidence of dilution.[9/]

9/ Reply Memorandum at 1, et seq. In Robert Ross and Sons, Inc., TSCA-V-C-008, Initial Decision, 101 ALC 151 (1982), appeal pending, the lack of a representative sample was held to be fatal to Complainant's case and the provisions of 40 CFR 761.1(b), making subject to the regulation chemical substances containing less than 50 ppm

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Footnote No. 9 Continued:

PCBs because of any dilution and 761.10(g)(ii) providing that if PCBs in excess of 500 ppm have been added to the container, the entire container contents must be presumed to contain PCBs at a concentration of 500 ppm or greater, were held to be inapplicable in the absence of evidence of [deliberate] dilution. While no reason was given for the latter conclusion, it must stem from the fact that multiple sources would be highly unlikely to contain identical concentrations of PCBs, making it clear that 761.10(g) of necessity contemplates some dilution. Ross, however, did not consider that 761.10(g) cannot have the significance attributed to it, if the gloss of the preamble (44 FR 31520-21, quoted in the text) is read into the regulation and

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Deletion of "PCB mixture" from the regulations does not have the significance attributed to it by Respondent, because the oils here involved are chemical substances or combinations thereof as defined in 40 CFR 761.1(b).

Respondent asserts that the concept of dilution should not be confused with intra-liquid stratification of waste oil by its own chemical properties (Reply Memorandum at 6). This argument might well carry the day or at the very

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Footnote No. 9 Continued:
761.10(g) is applicable only to dielectric fluids and waste oils otherwise assumed to contain between 50 ppm and 500 ppm PCBs. In any event, Complainant in Ross did not argue that a representative sample in a scientific sense was not required as a matter of law, but only that it had taken such a sample.

least provide compelling reasons for reducing the penalty, if there was evidence to support it. It is true that Respondent's expert, Mr. Ziegler, testified that PCBs had a tendency to stratify (finding 13). However, in answer to a specific question as to where he would expect to find PCBs in a tank of oil, Mr. Ziegler replied that it would depend on a lot of factors, whether the oil was homogeneous and at what part of the oil the contamination may be and further "(I) could not answer that question specifically; its a hard thing to predict and there are various factors involved when you start talking about one organic species and another organic species" (Tr. 286). Accordingly, any conclusion that PCBs found in the top of Tank No. 4 at a concentration of 76 ppm

were due to intra-liquid stratification of PCBs in concentrations below 50 ppm would be pure speculation. Because this is in the nature of an affirmative defense, requiring Respondent to prove the applicability of its intra-liquid stratification theory does not violate the rule that Complainant must prove the violation charged by a preponderance of the evidence (Rules of Practice, 40 CFR 22.24).

Next, Respondent argues that the method of analysis of the sample used by EPA was scientifically inadequate and cannot support the violation charged (Post-Trial Memorandum at 28). The equipment used to conduct the test on Sample 57970 from Tank No. 4 at Respondent's facility was a gas chromatograph with an electron capture detector (finding 12). Cleanup procedure

used was silica gel (Gov't's Exh 8). The purpose of the cleanup procedure is to separate PCBs from hydrocarbon present in the oil (Tr. 185). Mr. Ziegler, Respondent's expert, did testify that he would prefer to use a gas chromatograph with a Hall Electrolytic Conductivity Detector rather than an electron capture detector, because the former was halogen specific and would not respond to interferences (Tr. 286-88). He further testified that even with proper cleanup procedure, it was very important when using the GCEC to run tests with spiked samples to demonstrate proper recovery of PCBs and that no interferences are present (Tr. 289). He stated that it was critical to prepare internal standards to quantify retention times and use as a standard for identification

of PCB peaks. Mr. Karras, EPA chemist who conducted the test on Sample 57970, testified however, that he conducted tests on standard PCBs and compared the standards with previous chromatograms to assure that the gas chromatograph was in good working order (Tr. 196-97). It is concluded that Respondent's attack on the adequacy of the EPA test has not been proven and that the evidence supports a finding that the EPA test, showing PCBs at a concentration of 76 ppm, was properly conducted.

Turning to the penalty, Complainant proposes to assess Respondent $15,000 for the failure to Tank No. 4 to have the PCB mark as required by 40 CFR 761.20 and $15,000 for the failure to have a SPCC Plan in effect as required by 40 CFR 761.42(c)(7)(ii). An additional

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$10,000 is proposed to be assessed for the failure to maintain records showing quantities and dates PCBs were added to the container. Although not specifically referred to in the complaint, it is clear that the proposed penalty was calculated in accordance with Agency guidelines for the assessment of civil penalties under TSCA effective March 10 and April 24, 1980 (45 FR, No. 177, September 10, 1980, at 59770). The marking violation was determined to call for a Circumstance Level 3 assessment (major marking violation) because of the volume of PCB contaminated oil (45 FR at 59777-78). A similar determination was made for the failure to have a SPCC Plan (Level 3, major storage violation). The failure to maintain records showing quantities and dates PCBs were added to the container

was determined to be a major record-keeping violation (Circumstance Level 4). Although in response to a prehearing inquiry from the ALJ (letter, dated March 4, 1981), counsel asserted that Respondent was a small, family run corporation with limited assets and marginal profitability and that imposition of the proposed penalty would preclude Respondent remaining in business (letter, dated April 17, 1981), no evidence to support these assertions was proffered or introduced at the hearing. There is also no evidence by which any of the other statutory factors required to be considered in determining the amount of the

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penalty[10/] might be applied to reduce the

10/ Sec. 16 of the Act is entitled "Penalties" and subsection (a) "Civil" provides in pertinent part:

"(2)(B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."

penalty proposed by Complainant,[11] which, as we have seen, was calculated in accordance with applicable guidelines. Accordingly, the penalty proposed by Complainant of $40,000 will be assessed against Respondent.

Order[12]

11/ For example, evidence of good faith would bear on the degree of culpability and might afford a basis for reducing the proposed penalty.

12/ Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision shall become the final order of the Administrator in accordance with 40 CFR 22.27(c).

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The violations of Section 15 of the Toxic Substances Control Act (15 U.S.C. 2614) charged in the complaint having been established, a civil penalty of $40,000 is assessed against Respondent N.O.C., Inc., T/A Noble Oil Company, in accordance with Section 16 of the Act (15 U.S.C. 2615). Respondent is hereby ordered to pay the same by mailing or delivering a certified check payable to the Treasurer of the United States in the amount of $40,000 to the Regional Hearing Clerk within 60 days of the date of this order.

Dated this 3rd day of December 1982.

/s/ Spencer T. Nissen
Spencer T. Nissen
Administrative Law
Judge

APPENDIX B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
N.O.C., Inc.,	)	
T/A Noble Oil	)	Docket No. II-TSCA-PCB-81-0105
Company,	)	
Respondent	)	

1. Toxic Substances Control Act - Rules of Practice - Motions to Reopen the Hearing - Where primary basis of motion to reopen the hearing was contention that scientific data on variability (standard deviation) of analyses of PCBs in waste oil matrices first made available subsequent to the conclusion of the hearing cast doubt on the conclusion in the initial decision that level of PCBs in Respondent's oil tank was in excess of regulatory limit

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of 50 ppm and the only evidence offered in support of the motion was data on interlaboratory variability (the EPA laboratory which made the analysis in question not having participated in the studies which generated the interlaboratory variability date), and under all the circumstances it did not appear likely that such data would change the result, the motion would be denied. Where validity and accuracy of analysis showing PCB concentration in waste oil tank to be in excess of 50 ppm was in issue, matters bearing on whether such analysis was properly conducted which could have been more thoroughly explored at the hearing were cumulative and could not support a motion to reopen the hearing.

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2. Toxic Substances Control Act - Rules of Practice - Motions to Reopen the Hearing - Where basis of alternative motion to reopen the hearing was contention that Respondent refrained from offering evidence concerning propriety of proposed penalty because of belief that penalty would be considered, if at all, only at a second hearing after liability was first determined and no evidence was offered to show that asserted belief was reasonable, alternative motion would be denied.

Appearances for Respondent:

Alan G. Kelley, Esq.
Greenberg, Kelley and Prior
Attorneys at Law
Trenton, New Jersey

Appearances for Complainant:

Gregory T. Halbert, Esq.
Office of Regional Counsel

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U.S.Environmental Protection Agency

Region II

New York, New York

Decision Denying Motion to

Reopen the Hearing

An initial decision, assessing a penalty against Respondent of $40,000 for violations of Section 15 of the Toxic Substances Control Act (15 U.S.C. 2614), was issued on December 3, 1982. The decision was served on Respondent by letter from the Regional Hearing Clerk, dated December 13, 1982, and received by Respondent on December 16, 1982. On January 4, 1983, within the 20-day period for filing a motion to reopen the hearing allowed by the Rules of Practice (40 CFR 22.28), counsel moved for an extension of time in which to file such a motion. This motion was granted and under date of

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January 19, 1983, Respondent filed a motion to reopen the hearing. After requesting and receiving two extensions of time in which to respond, counsel for Complainant's opposition to the motion was received on February 25, 1983. Respondent filed a reply brief under date of March 28, 1983, Complainant was permitted to file a response on April 11, 1983, and Respondent was permitted to and did file a final reply affidavit on May 3, 1983.

The basic thrust of the motion is that evidence and scientific data bearing on the analytical variability (standard deviation) of analyses of PCBs in waste oil matrices, first made available subsequent to the conclusion of the hearing (February 11, 1982), would preclude a finding that the PCB concentration determined here (76 ppm)

was in excess of the then regulatory limit of 50 ppm. In support of the motion, Respondent has attached the affidavit of Mr. William J. Ziegler, a chemist and Laboratory Manager for Stablex-Reutter, Inc., a consulting and testing firm. Mr. Ziegler appeared as an expert witness for Respondent at the hearing and testified, inter alia, that he was then engaged in a research project involving analysis of PCBs in waste oils and that he would be presenting a paper on that subject at the Pittsburgh Conference and Exposition on Analytical Chemistry and Applied Spectroscopy to be held the following month, March of 1982. Assertions in Mr. Ziegler's affidavit are based, in part, on this paper attached thereto.

Alternatively, Respondent contends that the hearing should be reopened to

allow evidence on the issue of the civil penalty because it believed that such evidence would be offered, if at all, only at a record hearing after liability had first been determined.

The substance of Mr. Ziegler's affidavit may be summarized as stating that at the time the 50 ppm regulatory limit was established there was no published and well recognized method for testing for PCBs in waste oils at that concentration, that high concentrations of PCBs in transformer fluids could be measured with a high degree of confidence [in the accuracy of the test], but that when waste oils, which present a considerably more complex matrix than transformer fluids, are analyzed at the [50] ppm level, the precision and accuracy of the method can suffer significantly. It is further asserted

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that the key to a laboratory quality assurance program is the analysis of spiked and replicate samples and the daily monitoring of accuracy and precision control charts, outside of which the analysis is considered out of control, that the measure of variability of data obtained at the 95 percent confidence level is two standard deviations, that the relation of the mean result obtained to the upper confidence level (UCL) and the threshold value (50 ppm) must be considered to determine if further analysis is warranted and that if the mean result exceeds the threshold value and also the UCL, then there is a considerable probability that the waste is not a hazardous waste. In such a case, further confirmatory and replicate determinations are warranted to substantiate a result in excess of the

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threshold value. According to Mr. Ziegler, the EPA tests on Sample No. 57970, which determined a PCB concentration of 76 ppm, from Noble Oil Company present exactly this type of situation.

Mr. Ziegler's affidavit states that at the 95 percent confidence limit (level) the interlaboratory variability[1/] for Stablex-Reutter for 50 ppm PCB in waste oil is ±34 ppm, which implies that only a result in excess of 84 ppm can be considered a violation of the 50 ppm limit

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1/ Although Mr. Ziegler states that it is the responsibility of every laboratory to monitor the precision and accuracy of its methods to define the degree and accuracy of intralaboratory variability, curiously it is interlaboratory variability that is emphasized here.

in the absence of numerous data on spiked and replicate samples, demonstrating a lower variability. If a laboratory does not have a program to monitor intralaboratory variability, or cannot produce data on a method for a given matrix, then data on interlaboratory variability must be considered, even though the precision and accuracy of intralaboratory data should be higher. In this regard, Mr. Ziegler cites two recent studies, "Comparison of Three Extraction Techniques for the Determination of Polychlorinated Biphenyls," Exh II, authored by himself and three others, presented at the mentioned Pittsburgh Conference, and "Data from Round Robin Study on PCBs in Waste Oil," (1982), Exh III, by the National Bureau of Standards. The former study shows that at the 50 ppm enforcement limit, using a

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95 precent confidence level (2 x standard deviation) an interlaboratory variability of ±67.7 percent exists using a modified EPA Method 608 and Environmental Monitoring and Support Laboratory (EMSL, Cincinnati, Ohio) Methods. This result is asserted to mean that a PCB test result must be greater than 84 ppm before it can be considered a statistically valid violation of the 50 ppm enforcement limit. Laboratories using the Hall Electrolytic Conductivity Detector the EMSL procedure had a much lower variability than labs using an electron captur (EC) detector. The National Bureau of Standards study involved 19 laboratories and also involved PCBs in waste oil matrice For samples close to the 50 ppm enforcement limit (41.0, 60.9, 41.0, 60.9, 41.0, 48.0 and 40.0 ppm) a mean standard deviatio of 27.4 ppm was obtained. This implies

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that at the 95 percent confidence level a variability of ±54.8 ppm exists at the 50 ppm PCB enforcement limit. Using this data, a sample would have to exceed 105 ppm before it could be considered to be statistically in violation of the 50 ppm limit.

Applying these data to the EPA test on Sample No. 57970 from Noble Oil Company, Mr. Ziegler concludes that the sample result of 76 ppm is neither statistically nor analytically in definitive violation of the 50 ppm PCB limit. He points out that an EC detector was used for the analysis, that EMSL procedure specifies a Hall over an EC detector because of false positive or negative interferences that may result from nonhalogenated materials in waste oils, that it was possible false positive.

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responses were observed in the EPA analysis and to demonstrate that this was not the case, an internal standard and alternate column chromatography should have been performed. He further points out that no internal standard was used by EPA in its analysis so that no positive identification of chromatographic peaks as PCBs can be made, that EPA (EMSL) procedure specifies that at least 10 percent duplicate and 10 percent spiked determinations be performed to ensure that the method is in control and that no such data was provided by EPA to support the reported result on Sample 57970. Because no control charts have been provided to define the intralaboratory variability of the EPA Edison, New Jersey laboratory involved in the test of Sample 57970, Mr. Ziegler asserts that a

statement cannot be made as to the variability of the analysis and data on interlaboratory variability and precision must be used. According to Mr. Ziegler, the result of 76 ppm is not statistically in violation of the 50 ppm PCB limit at the 95 percent confidence level using interlaboratory data and EPA requirements in such a situation specify that additional sampling and analysis is necessary because the UCL is greater than the threshold value.

Opposing the motion, counsel for Complainant has submitted the affidavit of Mr. George M. Karras, the chemist who conducted the test on Sample No. 57970. In accordance with his testimony at the hearing and as found in the initial decision, Mr. Karras used a silica gel cleanup procedure to prepare the sample for the test. This procedure is authorized

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by EPA (Exh 8) and its purpose is to remove materials which might interfere with the analysis. The test was conducted using Method 608 (44 FR No. 233, December 3, 1979, at 69501-09) beginning with Paragraph 11 (Exh 7).

Mr. Karras states that on January 27, 1982, he analyzed an aliquot of Sample 57970, using the silica gel cleanup procedure and Method 608 beginning with Paragraph 11 as in the original test. The analysis resulted in a determination of 70 ppm PCBs. He further states that at the time of the mentioned analysis on January 27, 1982, he was conducting a laboratory quality assurance program under which he analyzed a sample of waste oil spiked with a known standard of PCBs. He also prepared a quality control chart, covering the period June 1981 through

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September 1982, to measure intralaboratory variability of the PCB analysis (Exh 2 of affidavit). This indicates that intra-laboratory variability in January 1982 was from 74.6 to 127.4 percent at a 99 percent confidence level. Using the lower con-fidence [variability] level for the January 27, 1982, analysis of Sample 57970 produces a result of 52.44 ppm of PCBs (70.3 ppm x 74.6 percent), which is above the 50 ppm enforcement limit.

Responding specifically to assertions in Mr. Ziegler's affidavit concerning the paper presented at the Pittsburgh Conference showing an interlaboratory variability of PCBs at the 50 ppm threshold for Stablex-Reutter of $\pm$67.7 percent at a 95 percent confidence level, Mr. Karras points out that the EPA

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Region II laboratory did not participate in the study and that the only appropriate measure of variability for the EPA laboratory is his study on intralaboratory variability previously mentioned. Regarding the NBS study, the EPA Region II laboratory was again not a participant. Mr. Karras states that without having more information as to the conduct of the NBS study he is unable to comment thereon, specifically whether samples of waste oil analyzed were cleaned prior to analysis, what cleanup procedures and gas chromatograph detectors were used, and the training and experience of individuals conducting the analysis. He points out that data accumulated using several cleanup procedures, multiple analytical procedures and performed by individuals with varying degrees of experience can be expected to

demonstrate a much higher variability, than in a single laboratory using stringent quality control procedures such as the EPA lab involved here. It is asserted that without such data, the results of the NBS study are not meaningful. He emphasizes that Mr. Ziegler acknowledged that intralaboratory variability data is much preferred to interlaboratory data.

Respondent's brief and an additional affidavit of William J. Ziegler, Laboratory Manager of Stablex-Reutter, Inc., were received on March 31,1983. Mr. Ziegler points out that no evidence concerning the analysis of Sample No. 57970 performed by Mr. Karras on January 27, 1982, was introduced at the hearing on this matter and that because Method 608 requires that all samples be extracted within seven days and completely analyzed within 30 days of

collection, the January 1982 test may not be regarded as a valid replicate determination (¶ 4). It is asserted that the control chart submitted as Exhibit 2 of Mr. Karras' affidavit covers the period June 28, 1981, through September 25, 1982, and is not applicable to the July 22, 1980 test involved here (¶ 8). Moreover, in the absence of data on the matrix used, the chart is of little value because there is a much lower degree of variability in analysis of a water sample than in a more complex matrix such as a waste oil. The affidavit states that quality assurance data in the form of duplicate determinations, spiked analyses, control charts, internal standards, analysis of field blanks, reagent blanks or alternate column chromatography were not provided to support the July 1980 analysis and that in the absence thereof,

interlaboratory variability at the 50 ppm limit must be considered (¶ 5).

Mr. Ziegler states flatly that Mr. Karras has failed to demonstrate that his analysis was in control using the required protocol for PCB analysis set forth in listed EPA publications including Method 608, and EPA-EMSL The Analysis of Polychlorinated Biphenyls in Transformer Fluid and Waste Oil, June 24, 1980.[2/] He

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2/ Respondent's Exh 5. ¶ 10.6.2 of the cited procedure provides:

"10.6.2 If individual retention time varies by more than 10% over an eight-hour period or does not fall within 10% of an established norm, the system is "out of control." The source of retention data variation must be corrected before acceptable data can be generated."

further states that sections on chromatographic operating conditions call for the use of an internal standard of p,p'-DDE in every sample and standard for proper identification of PCBs and to prove that the gas chromatograph is functioning properly. He raises doubts as to the value of the control chart in supporting the accuracy of the EPA test, saying that it is not clear whether waste oils were used as the matrices or whether the tests were conducted at the 50 ppm regulatory limit (¶ 8-10). Replicate determinations were allegedly not performed nor were replicate control charts provided for any period of time, pertinent to the initial analysis of Sample 57970, demonstrating the precision of the EPA Region 1I laboratory in PCB analysis of waste oils (¶ 11 & 13). Laboratory and field replicate data and data on the analyses of fortified samples were not

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reported as required by ¶ 12.2 of EPA Method 608 (¶ 14).

Mr. Ziegler cites ¶ 7.1 of EPA Method 608 specifying that each time a set of samples is extracted or there is a change in reagents, a method blank should be processed as a safeguard against chronic laboratory contamination, asserts that EPA could not provide data that this was accomplished for either the July 22, 1980 analysis or the January 27, 1982 analysis and asks rhetorically what guarantee is there that such [laboratory] contamination did not occur or that the sample containers were free from contamination (¶ 12). He also cites 44 FR No. 233, December 3, 1979, at 69553 as requiring analysis of a field blank and states that this protocol was not followed by EPA in the case of Sample

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No. 57970. Absent analysis of a field blank or documentaiton that sample containers were cleaned as specified in Section 3 of EPA Method 608, there is, according to Mr. Ziegler, no evidence to prove that the container has not been contaminated (¶ 13). Mr. Ziegler complains that the single calibration run by the EPA laboratory is not in accordance with ¶ 6.1 of Method 608 requiring that calibration standards be prepared covering two or more orders of magnitude that will completely bracket the working range of the chromatographic system (¶ 15). The lack of such calibration standards allegedly makes the result (quantitation) obtained on Sample 57970 highly questionable.

Mr. Ziegler maintains that the use of an internal standard of p,p'-DDE is a

matter of routine, citing ¶ 11 of the EMSL procedure,[3/] and not an option, but must be followed because it is the only way to certify that the gas chromatograph is functioning properly and positively identify the presence of PCBs without bias

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3/ EMSL procedure at the time of the initial test on Sample No. 57970 was a draft "The Analysis of Polychlorinated Biphenyls In Transformer Fluid and Waste Oils," dated June 24, 1980 (note 2 supra), which has now been finalized "The Determination of Polychlorinated Biphenyls in Transfermer Fluid and Waste Oils," EPA-600/4-81-045 (Exh 3 to Karras affidavit of February 18, 1983).

or error from small deviations in absolute retention times (¶ 16). It is emphasized that identification of PCBs (Aroclor) is based on relative and not absolute retention times, that an internal standard is essential for the very identity of PCBs in a complex matrix such as waste oil and that absent an internal standard, Mr. Karras' opinion that the peaks matched Aroclor 1260 is totally arbitrary. Mr. Ziegler says that the data provided in his study and the NBS study are the first studies on analytical variability of PCB analysis of waste oils at the 50 ppm limit (¶ 17). He asserts that EPA procedures were being used by laboratories, known to be competent in PCB analysis, involved in the studies and that unless EPA can demonstrate intralaboratory variability for PCBs at the 50 ppm limit, it is valid

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to use his data and NBS data to evaluate the statistical significance of results obtained on Sample 57970. In fact, he argues that there is no choice but to use "round robin" data in evaluating evidence in this matter.

Examining chromatograms of tests conducted by the EPA laboratory on January 27, 1982, submitted with Mr. Karras' affidavit of February 18, 1983, Mr. Ziegler alludes to inconsistencies, which he contends raise similar questions as to the July 22, 1980 analysis (¶ 18). He notes that the chromatogram (Exh 1 of the Karras affidavit) reflects that a one milliliter sample size was used and that Mr. Karras testified at the hearing that a one milliliter sample size was also used in the July 1980 analysis (¶ 19). He points out that the EMSL

procedure (June 24, 1980) specifies that the aliquot must be accurately weighed and states that it is impossible to accurately pipet a one milliliter aliquot of a viscous waste oil. He refers to ¶ 7.2 (7.2.2 of the April '81 procedure) which specifies that the size of the aliquot taken must be determined within ±0.001 grams, asserting that failure to do this would add an additional error that could be as high as ±20 percent in addition to the normal variability of the test method when performed in a proper manner. According to Mr. Ziegler, this means that if normal variability is ±25.4 percent, total variability could be as high as 45.4 percent, which would extend the EPA Region II determination at the 95 percent confidence level to 40 ppm, below the TSCA limit.

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Mr. Ziegler refers to markings on the chromatograms submitted with Mr. Karras' affidavit, which he contends indicate that the calculations shown thereon could be off by a factor of 100 so that the result of 70.3 ppm PCB should be 0.703 ppm (¶ 20). This is because the markings appear to indicate that a one milliliter aliquot of oil was diluted to 100 milliliters, which dilution was not recognized in the calculations.

Responding to these contentions, Complainant, while acknowledging that ¶ 8.3 of Method 608 requires that all samples must be extracted within seven days and completely analyzed within 30 days of collection, contends that Mr. Ziegler misrepresents the purpose

of this requirement.[4/] It is asserted that the Method was originally developed for the analysis of wastewater samples, that the purpose of the 30-day requirement is to

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4/ Response of April 11, 1983, at 7. This argument appears inconsistent with the contention (at 16, infra) that extraction is applicable only to water samples. Paragraph C.2. of the Silica Gel Cleanup Procedure (EPA Exh 8), which is clearly applicable to oil samples, significantly refers to Method 608, 44 FR No. 233, December 3, 1979, 69501-09, in its entirety, rather than just selected portions thereof.

prevent degradation of the samples and that the re-analysis of Sample 57970 on January 27, 1982, 500 days after it was collected, in no way prejudiced Respondent because if the extended holding period had any effect at all, it was to Noble's advantage in that the concentration of PCBs in the sample was understated (Id. at 8,9). Mr. Ziegler is of the opinion that degradation of PCBs is unlikely because of their high stability, agrees that extended holding times may understate the level of PCBs, but says that extended holding times may also overstate the level of PCBs, due to volatization of the lighter

hydrocarbon fractions.[5/] It is emphasized that Mr. Karras testified at the hearing that in analyzing Sample No. 57970, he used Method 608 beginning at ¶ 11 (Tr. 178).

The fact that Mr. Karras did not use an internal standard in the analysis of Sample No. 57970 on July 22, 1980 was

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5/ Affidavit, dated May 2, 1983, at 2. The Webb and McCall article cited in the EMSL procedure, Quantitative PCB Standards for Electron Capture Gas Chromatography (Journal of Chromatographic Science, Vol. 11, July 1973, at 366), states that chromatograms of PCBs usually show some evidence of degradation or metabolism (Id. at 369). While this is understandable, if, for example, the sample is animal tissue, it is not clear that this applies to waste oils.

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elicited in cross-examination of Mr. Karras at the hearing (Tr. 196). Disputing Mr. Ziegler's assertion that an internal standard is required on every sample for proper identification of PCBs, Complainant cites ¶ 11.5 of the EMSL procedure (EPA-600/4-81-045, note 3, supra) and contends that an internal standard is required only when the source of Aroclors or PCBs is not apparent. The first sentence of the cited paragraph provides "If the parent Aroclors or source of PCBs is not apparent, calculate the concentration according to the procedure of Webb and McCall." (note 5, supra). The identical statement appears in ¶ 11.4 of the draft procedure. According to Mr. Karras, the Webb and McCall procedure

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uses an internal standard,[6] but an internal

6/ The Webb and McCall article (note 5, supra) provides that the [GC] peaks are identified by their retention times relative to p,p'-DDE and recommends that this be adopted as a standard method for designating individual PCB GC peaks. Mr. Ziegler testified that p,p'-DDE was a pesticide residue and that "you add that internal standard and you quantify your retention times, which is a measure of identity when the peaks come out on the GC trace. You use the standards as a relative standard to when the materials are coming out and that is how you make your identification of PCB's" (Tr. 289). According to Mr. Ziegler, this was critical in electron capture analysis and additional quality control is necessary to demonstrate that all possible interferences had been removed in the cleanup.

standard was inappropriate in his analysis of Sample No. 57970 on July 22, 1980 and January 27, 1982, because he was able to identify the source of the peaks as Aroclor 1260 (Affidavit at ¶ 7).

Complainant points out that the quotation relied upon by Mr. Ziegler in ¶ 16 of his affidavit relative to analysis of standard mixtures of each Aroclor is contained in ¶ 11.4.2 of the draft version of the EMSL procedure, implying that a similar requirement is not contained in the final version. While this is incorrect as ¶ 11.5.2 of EPA 600/4-81-045 contains an identical requirement, Mr. Ziegler's position appears to overlook the alternative to use of p,p'-DDE as an internal

standard.[7/] Mr. Ziegler expresses the opinion that he would not leave it to personal judgment as to whether a sample chromatogram sufficiently resembles a standard Aroclor, says that an internal standard is easy to use, that data interpretation without an internal standard

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7/ Paragraph 11.4.2 of the EMSL draft (¶ 11.5.2 of 60014-81-045) provides in part: "Determine the relative retention time (RRT) of each peak in the standards with respect to p,p'-DDE or assign the RRT shown in the figures [chromatograms of Aroclors, Figures 3,5 and 6 in the procedure] to the corresponding peak in the standard. (emphasis supplied) Identify the RRT of each PCB in the sample by comparing the sample chromatogram to the standard chromatograms."

is pure opinion, but that data interpretation based on relative retention times is irrefutable scientific fact (Affidavit of May 2, 1983, at 17).

Concerning Mr. Ziegler's statement that the EPA control chart (Exh 2 of Karras affidavit) does not reflect the matrix used, Complainant notes that ¶ 4 of the Karras affidavit clearly states that a sample of waste oil was spiked with a known qantity of PCBs (Response at 10). This, of course, falls short of a declaration that waste oil was the matrix involved in all tests on the chart. The level of PCBs involved in the spike is also not stated. Mr. Ziegler's criticism (¶ 12 of affidavit) that EPA was unable to furnish data substantiating use of a method blank as required by ¶ 7.1 of Method 608 is dismissed as being based on a misrepresentation in that the cited paragraph is applicable

to analysis of water samples, and provides in part: "Each time a set of samples is extracted * *." Extraction is assertedly inapplicable to analysis of oil samples which are prepared by dilution with hexane.[8/] Answering, Mr. Ziegler declares that the method of preparation of the sample has nothing to do with whether a method blank

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8/ See note 4, supra. Extraction can, of course, simply mean withdraw and in this sense it would not seem likely that a one percent oil/hexane sample would be made without withdrawing oil from the initial sample container. Extraction can also imply a chemical process, which appears to be a type of process described in ¶ 9 of Method 608 entitled "Sample Extraction."

needs to be analyzed (Affidavit of May 2, 1983, at 5). He cites ¶ 10.5 of EPA/600-4-81-045, providing that each time a set of samples is analyzed or there is a change of reagents, a laboratory reagent blank should be processed as a safeguard against contamination, and alleges that a method blank is always necessary to prove that a laboratory's reagents, glassware and equipment are free from contamination. Regarding Complainant's contention that analysis of a field blank is only necessary in connection with EPA Methods 624 and 625 (44 FR No. 223, December 3, 1979, at 69553), he acknowledges that the cited reference (Appendix III) concerns detailed quality assurance measures for priority pollutant analysis using GC/MS, that Appendix I of the cited reference concerns GC methods for priority pollutant analysis

using GC/MS, that Appendix I of the cited reference concerns GC methods for priority pollutant analysis (Methods 601 thru 612) and asserts that the sampling considerations in this section including the importance of a field blank are applicable to Appendix I. He maintains, however, that use of a field blank is critical to prove that contamination has not occurred in the field or that sample bottles used for collection of samples are free from contamination and states that no other technique exists to guarantee contamination free sample containers.

Complainant attacks Mr. Ziegler's criticism of the calculations on the chromatogram (Exh 1 to Karras affidavit) as being possibly off by a factor of 100 as illustrating a profound lack of understanding of the procedures used by Mr. Karras in testing

the sample (Complainant's Response at 12). It is pointed out that ¶ C.2. "Sample Preparation" of the Silica Gel Cleanup Procedure provides in part "Carefully transfer 1.0 ml of 1% oil sample to the column" and that Mr. Ziegler's apparent assumption that 100 ml of the sample was passed through the column is incorrect.[9/] Mr. Ziegler

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9/ Paragraph 12.2 of Method 608 provides that results are to be reported in micrograms per liter without correction for recovery data. It is also noted that ¶ 7.2 EMSL procedure, draft and final version, provides for dilution at the rate of 100:1 for samples [containing PCBs] in the 0 to 100 mg/kg range. Moreover, it is of interest that a completed analysis report, dated July 1980, furnished in a prehearing exchange, but not offered in evidence, reflects the value for Sample 57970

denies any assumption that 100 ml of oil was placed on the silica gel column, saying that this would definitely overload column capacity (Affidavit of May 2, 1983, at 6). He states that a common practice is to place one ml of oil on a column and elute this by adding 100 ml of solvent,

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Footnote No. 9 continued:
as 76000.0 ug/L PCB-1260. The report indicates that this test was conducted on July 16, 1980, while testimony at the hearing was to the effect that the test relied upon was conducted on July 22, 1980 (Tr. 187, 192-93, 195). It is not clear whether this is an error as to date or a different test.

the entire eluent being collected. He explains that a common practice is to take the eluent and concentrate it, using Kuderna-Danish glassware, back to the original sample size of one ml, indicating that in the process sensitivity has been increased, and interfering hydrocarbons have been removed. He again refers to markings on the chromatogram of the test conducted January 27, 1982, which clearly state "1 ml sample to 100 ml, F.V. = 1 ml" and emphasizes that "F.V. must stand for final volume." He asserts that if it does stand for final volume there is definitely a factor of 100 error in the calculations. He further asserts that if the "in-house" silica gel procedure was followed, there is no need for the markings "F.V. = 1 ml" on the chromatogram and argues that these markings raise legitimate

and serious questions as to whether Mr. Karras followed his method in detail.

Mr. Ziegler avers that he was well aware that EPA Method 608 involved wastewater samples, points out that the silica gel cleanup procedure used by Mr. Karras appears to be an in-house and not a published method, and that although this procedure involves waste oils, the chromatographic method used (Method 608) applies to wastewater samples (Affidavit of May 2, 1983 at 2-3). He disclaims any implication that silica gel cleanup of environmental samples is not an approved technique, noting there are several silica gel cleanup techniques in EPA publications. He notes that Method 608 was used notwithstanding availability of the draft EMSL procedure, dated June 24, 1980 (see notes 3 and 4, supra) and that this enables

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Complainant to "pick and choose," omitting procedures considered inconvenient, while nevertheless, contending approved procedures were followed. He contends that it is clear that appropriate methods and quality assurance protocols were not adhered to in the analysis of Sample 57970.

Alternative Motion

As indicated previously, Respondent has moved in the alternative that the hearing be reopened on the issue of the civil penalty. The basis for this alternative is the contention that Respondent at all times intended that there be a subsequent hearing on the penalty after liability was first determined (Memorandum of Law In Support of Respondent's Motion to Reopen the Hearing, dated January 19, 1983, at 14). In a footnote (Id. at 15), Respondent argues that it is entitled

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to show that no useful purpose would be served by the imposition of a civil penalty because: "(1) Noble provides an important economical alternative to disposal of waste oil by recycling that oil and permitting its reuse by the people of New Jersey and elsewhere; (2) there is no indication or allegation that Noble knew or should have reasonably known in the course of its purchase of waste oil from various dealers throughout the state that PCBs may have been present in the oil; (3) Noble at all times fully cooperated with the EPA even though it had good cause to believe that EPA's sampling and analysis were scientifically invalid; and (4) the imposition of a civil penalty would be a uniquely punitive action without any possible purpose of deterrence." Presumably, evidence bearing on the listed

matters would be offered if the motion was granted.

Opposing the alternative motion, Complainant asserts that there is no basis for Respondent's bifurcated hearing theory and points out that the complaint, dated January 24, 1981, informed Respondent that it could request a formal hearing to, inter alia, "contest the appropriateness of the amount of the proposed penalty." It is further pointed out that Rule 22.27(a) of the Rules of Practice (40 CFR Part 22) provides in part that the initial decision shall include a "recommended civil penalty assessment, if appropriate." (Memorandum In Opposition to Respondent's Motion to Reopen the Hearing, dated February 22, 1983, at 22-23). Additionally, the prehearing correspondence between the ALJ and prior counsel for Respondent

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cited at 13-14 of the initial decision, and the Trial Memorandum, dated January 21, 1982, wherein it is argued at 17-18 that the imposition of any penalty would be inappropriate are cited to refute any suggestion that Respondent did not understand that the hearing included the issue of an appropriate penalty, if liability was found (Opposition at 23-24). Complainant also points out that in a similar PCB enforcement proceeding under the Toxic Substances Control Act (Oil Recovery Company, Inc., Docket No. II-TSCA-PCB-81-0106) the hearing of which was held seven months prior to the instant hearing, and wherein counsel for Respondent herein represented respondent in that case, the issue of whether liability and the amount of the penalty would be considered in a single hearing was specifically

considered and resolved in the affirmative (Memorandum in Response to Respondent's Reply Brief, dated April 11, 1983, at 15-17).

Discussion

Rule 22.28 of the Rules of Practice (40 CFR Part 22) entitled "Motion to reopen a hearing" provides in pertinent part:

> "(a) Filing and content. A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific ground upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that

> such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk."

Complainant says that the quoted rule appears to be patterned after and to serve the same purpose as Rule 59(a), Federal Rules Civil Procedures "New Trials: Amendment of Judgments" (Opposition at 8). It is argued that new trials are not favored and that the grant of a new trial in non-jury cases is limited to situations where there has been a manifest error of law or mistake of fact, citing Wright & Miller, Federal Practice and Procedure, Civil § 2804 (1973). The affidavit of Attorney Alan G. Kelley in

support of the motion to reopen acknowledges that the Ziegler data on analytical variability (standard deviation) of PCB analysis was first made available after the hearing in this case and makes it clear that the basic thrust of the motion is that the interests of justice require that the hearing be reopened (Id. at ¶ 5 & 6). A motion under FRCP Rule 59 upon the ground that the interests of justice require a new trial is at odds with the policy that there be an end to litigation and thus will be granted only in unusual or extreme situations. This would seem to be especially true of the after occurring events or after acquired

data involved here.[10/] As counsel points

10/ EPA quotes the following from State of Washington v. United States, 214 F. 2d 33 (9th Cir. 1954):

> "The policy of Law in having an end to litigation would in most cases prevent the reopening of a case because of after-occurring events [citation omitted]
>
> But, a general exception exists where substantial justice requires a reopening and when the after-occurring event is of major importance in its impact on the case."
>
> 214 F. 2d at 46-47.

This, of course, clearly indicates that an after-occurring event having a major impact on the decision, may be a ground for a new trial in the federal courts.

out, however, Mr. Ziegler testified at the hearing that he was evaluating the variability of the 50 ppm TSCA limit and would be presenting a paper on that subject at the Pittsburgh Conference on Analytical Chemistry in March of that year (Tr. 227, 256). Evidence is lacking as to the status of that research at the time of the hearing herein.

Complainant contends that Respondent has failed to identify the specific grounds for its motion, that Mr. Ziegler is making essentially the same points questioning the EPA test procedure in his affidavit as he did in his testimony at the hearing and thus Respondent has failed to show that the evidence proposed to be adduced is not cumulative and lastly, that Respondent has failed to show good cause why the evidence was not adduced

at the hearing (Opposition at 13-14). Pointing to the uncertain status of Mr. Ziegler's research paper at the time of the hearing, Complainant asserts that Mr. Ziegler could have testified as to the results of his research or Respondent could have requested an adjournment to enable further testimony after the paper had been completed and presented at the Pittsburgh Conference.

Replying, Respondent argues that the FRCP and cases decided thereunder are inapplicable, that its motion is clearly permitted by the Rules of Practice, that there is no reason for these rules to be applied in a rigid, talismanic fashion, that its motion complies with the minimum requirements

of Rule 22.28.[11] and that fundamental fairness requires that the hearing be reopened, in that the previously unavailable statistical evidence sought to be introduced has a profound impact on the reliability of the EPA test and upon the threshold question of Respondent's

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11/ Although most of the cases cited by Respondent involve rulemaking under the APA, Trujillo v. General Electric Co., 621 F. 2d 1084 (10th Cir., 1980) & Duval Corp. v. Donovan, 650 F. 2d 1051 (9th Cir., 1981) involve adjudication and stand for the proposition that administrative bodies have inherent authority to reconsider their decisions and that any agency's action on a petition for reconsideration is discretionary.

liability for the alleged violation (Reply Brief at 4-10). Respondent also disputes Complainant's contention that the control chart showing intralaboratory variability furnished with the Karras affidavit of February 18, 1983, establishes that the interlaboratory data supplied by Mr. Ziegler is inapplicable (Reply Brief at 11, et seq.). Respondent argues that it should be permitted to cross-examine Mr. Karras as to why this chart, which allegedly was in existence at the time of the hearing, was not produced or referred at the time.[12/]

12/ One obvious and likely reason is that the test on an aliquot of Sample No. 57970 conducted in January of 1982 was far beyond the 30-day requirement of ¶ 8.3 of Method 608 (note 4, supra, and accompanying test). It is also noted that the final version of the EMSL procedure (¶ 10) requires precision and accuracy data to be maintained after January 1,1982.

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It is pointed out that the chart fails to indicate the matrix or the PCB spike level used in the tests and that if, through cross-examination of Mr. Karras, these were shown to be inappropriate, Complainant's argument that it has intra-laboratory data, which is preferable to the interlaboratory data proffered by Respondent, must fail (Id. at 13). Respondent further argues that Complainant's submission of a control chart, allegedly made in conjunction with the test on an aliquot of Sample No. 57970 approximately 18 months after the sample was drawn, constitutes belated recognition of the invalidity of the July 1980 analysis and that this invalidity cannot be cured by a test made long after the 30-day period specified by Method 608 (Id. at 14-15. Respondent reiterates its belief that

two hearings would occur as a reason for reopening the hearing on the issue of the civil penalty (Id. at 19-20).

Although Respondent may well be correct that administrative agencies are not bound by rigid rules applicable to courts and, consequently, have more discretion in acting upon petitions for reconsideration or motions to reopen the record should not lightly be granted.[13/]

13/ This is not only because of the expense and inconvenience of hearings, but also because the prevailing party should not be subjected to the risk of having a favorable decision overturned in the absence of substantial reasons.

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Here it is obvious that the principal original basis for the motion, i.e., that evidence bearing on the analytical variability (standard deviation) of analyses of PCBs in waste oil matrices, first made available after the conclusion of the hearing, would preclude a finding that the PCB concentration of 76 ppm determined herein was in excess of the regulatory limit of 50 ppm, has been broadened into a full scale attack on the validity of Complainant's conduct of the analysis in question. This is no doubt due, at least in part, to data, a control chart and an analysis of Sample 57970 conducted on January 27, 1982, supplied in opposition to the motion, which were apparently available at the time of the hearing (February 9-11, 1982), but not referenced or offered in evidence. If this data

were essential to support the finding of 76 ppm PCBs upon which the finding of violation is based, it is clear that the motion would, of necessity, be granted, because Respondent had no opportunity to question such data through cross-examination or otherwise at the hearing.

It is concluded, however, that quality control data and evidence concerning the analysis of Sample 57970 conducted on January 27, 1982, are not essential to support the finding of 76 ppm PCBs. This is because Mr. Karras, the analyst who conducted the July 1980 test, testified that he ran a known standard of PCBs and compared the resulting chromatogram with previous chromatograms to assure that the chromatograph was in good working order (Tr. 196-197). This coupled with the testimony that he used the Silica

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Gel Cleanup Procedure (Government Exh 8) in preparing the sample and ran the analysis in accordance with ¶ 11 of Method 608 (Government Exh 7) is sufficient to support the validity of the analysis as against other evidence in the record tending to detract therefrom.14/

14/ That evidence was detailed in the initial decision and need not be repeated here. Regarding Mr. Ziegler's preference for a Hall electrolytic conductivity detector rather than the GC electron capture detector used here, because the former is halogen specific and will not respond to interferences, Complainant points out that both the draft and final EMSL procedure recognize that other semi-specific detectors such as ECD may be used where sample chromatographic peaks closely match those of the standards and provided proper cleanup procedures are followed.

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For the question is not whether detailed testimony or documents in evidence establish, for example, that the sample containers were free of contamination, that cleanup procedures were properly followed and substances which might interfere with the identification of PCBs removed, that the sample aliquots of oil were properly measured or weighed and diluted with the appropriate amount of hexane, which dilution was properly recognized in the calculation of PCB levels or quantities and PCB peaks properly identified, but rather, whether there is sufficient evidence in the record of deficiencies in the foregoing or other respects of the test as to cast substantial doubt upon the validity of the conclusion that the level of PCBs in Sample 57970, and thus in Tank No. 4,

was in excess of 50 ppm. The point being that Mr. Karras could have been cross-examined on all of these matters and the significance of any deficiencies thus revealed supported by the testimony of Respondent's expert, which might have afforded a more substantial basis for Respondent's contention that the test was scientifically inadequate.

As noted earlier, the fact that Mr. Karras did not use an internal standard in the analysis of Sample 57970 in July of 1980 was elicited in cross-examination at the hearing. Although Mr. Ziegler is critical of the failure to utilize an internal standard, contending that this places too much confidence in the personal judgment of the analyst, identifying RRTs of PCBs in the sample by comparing the sample chromatogram to

to standard chromatograms is sanctioned by the EMSL procedure (note 7, supra, and accompanying text).

The foregoing demonstrates that Respondent's attack on the validity of the analysis of Sample 57970 is largely cumulative of matters which were either specifically raised or by necessary implication inherent in issues considered in the initial decision and cannot support a motion to reopen the record.[15/] This

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15/ Whatever may be the proper construction of the 40 CFR 22.28, it would seem to be clear that the rule is not intended to and cannot serve as a vehicle for correcting errors in strategy or oversights of counsel at the hearing. If it was otherwise, the concept of finality would have no meaning.

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includes Mr. Ziegler's complaints that data concerning quality assurance measures have not been furnished, that no evidence of analyses of field and method blanks to assure contamination free sample containers and instruments have been provided, that his concerns about a possible error by a factor of 100 in the calculation of PCB levels have not been answered[16/] and that the method of sample preparation has not been documented so

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16/ This concern results from calculations on the chromatogram of Sample 57970, which was run on January 27, 1982. As noted, supra at 25, this chromatogram is not essential to support the finding of 76 ppm PCBs.

as to establish that an accurate aliquot of oil was measured or weighed.

Concerning the principal basis of the motion, there is, of course, nothing new or startling about the concept of analytical variability (standard deviation) of analyses of PCBs or other substances for that matter. For example, the Webb and McCall article (note 5, supra) contains data on the relative standard deviation of analyses of various Aroclors, calculated as a precentage of the mean of the results. Similar or identical data is contained in the draft EMSL procedure, dated June 24, 1980, and the final version, EPA-600/4-81-045. Paragraph 13.1 of Method 608 states that EMSL is in the process of conducting an interlaboratory method study to determine the accuracy and precision of this test procedure. More-

over, Mr. Ziegler was questioned on this precise point during the hearing and he replied that the precision of the test depended not only upon how the test was run, but upon the matrix being analyzed (Tr. 259). He indicated that the variability of analyses of PCBs in water samples was less than that of an oil or hydrocarbon sample and that his laboratory liked to keep the relative standard deviation at better (less) than a plus or minus 20 percent difference.

Accordingly, the only new evidence offered in support of the motion is data on interlaboratory variability, which has not been established as applicable to an analysis conducted on July 1980 by a laboratory not participating in the 1982 studies which generated the data. Accordingly, even if this interlaboratory

variability data were admitted into evidence, it is unlikely to change the result.[17/] Respondent is relying on the interests of justice and fundamental fairness to support the motion, and a requirement that the proffered evidence

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17/ As found in the initial decision, duplicate samples from each of the tanks were left with Respondent at the time of the inspection on July 15, 1980. Respondent's silence as to the disposition of these samples and the results of any analyses conducted thereon, could afford the basis for an inference that such evidence would be adverse to Respondent.

be likely to change the result seems reasonable.

Respecting the alternative basis of the motion, Respondent has offered no explanation for its asserted belief that the issue of the penalty would be considered at a second hearing only after liability was determined in the first instance. Indeed, in view of the complaint, the rules of practice and the prehearing correspondence cited in the initial decision, it would appear that no reasonable basis for such a belief could exist. Moreover, as Complainant points out, Respondent's silence at the hearing as to any possible second hearing where the issue of penalty would be considered, militates strongly against the existence of such a belief at the time. If the amount of the penalty is unduly burdensome,

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Respondent would not appear to be totally without remedy.[18/]

Conclusion[19/]

18/ Although the Federal Claims Collection Act of 1966 (31 U.S.C. 951-53) provides for a limit on authority of the head of an agency to compromise claims to those that do not exceed $20,000, it also provides that the Act is not intended to diminish authority to settle or compromise claims and the agency would appear to have inherent authority to enter into an agreement for payment in installments or to otherwise compromise the claim based on economic hardship.

19/ Respondent's request for oral argument on the motion is denied.

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The motion to reopen the record is denied.[20/]

Dated this 16th day of May 1983.

/s/ Spencer T. Nissen

Spencer T. Nissen
Administrative Law Judge

20/ In accordance with 40 CFR 22.28 (b), the filing of the motion operated to stay the running of the 20-day appeal period provided by 40 CFR 22.30(a).

APPENDIX C

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

In the Matter of:	)	
N.O.C., Inc., t/a Noble Oil Company	)	TSCA Appeal No. 84-2
Respondent	)	

FINAL DECISION

Respondent, Noble Oil Company, [1/] appeals from a decision of Administrative Law Judge Spencer T. Nissen (presiding officer) in this civil penalty proceeding brought by Complainant, Director, Enforcement Division, Region II, United

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1/ When the complaint was issued, Respondent operated under the name of Noble Automotive Chemical & Oil Company.

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States Environmental Protection Agency, under the authority of §16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615(a). 2/ In that decision, the presiding officer determined that Respondent failed to mark a PCB container,

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2/ TSCA §16(a)(1) provides as follows:

> "Civil. (1) Any person who violates a provision of Section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of Section 15."

TSCA §15 provides, in pertinent part, that it shall be unlawful for any person to "(1) fail or refuse to comply with ... (B) any requirement prescribed by § ... 6, or (C) any rule promulgated under § ... 6."

failed to have a Spill Prevention Control and Countermeasure (SPCC) Plan, and failed to maintain records, all in violation of the PCB regulations, 40 CFR Part 761 (1980). The presiding officer recommended that the civil penalty of $40,000 requested by Complainant be assessed against Respondent. After the initial decision was issued, Respondent moved to reopen the proceeding so that it could introduce additional scientific evidence or, in the alternative, to introduce evidence concerning the civil penalty. See Motion to Reopen Hearing dated January 19, 1983. The presiding officer denied the motion and the instant appeal was filed. 3/ See Decision Denying

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3/ Complainant filed a brief in opposition to the appeal. See "Complainant-Appellee's Brief to the Judicial Officer" dated September 1, 1983.

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Motion to Reopen the Hearing dated May 16, 1983 and Respondent's Brief and Appendix on Appeal to the Judicial Officer dated July 20, 1983.

On appeal Respondent argues that the presiding officer erred because he determined that the PCB regulations were enforceable; 4/ because he determined that

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4/ Based on its argument that the PCB regulations were unenforceable, Respondent brought an action in district court to enjoin the presiding officer from issuing a decision. See Noble Automotive Chemical & Oil Co. v. EPA, _____F. Supp. _____ [19 ERC 1044] (D.N.J. 1982). The court rejected Respondent's argument. Noble Automotive at 1046-1047.

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Complainant's failure to take representative sample was not fatal to its case;[5/] because he determined that Complainant established the chain of custody of the sample; and because he determined that

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5/ The conclusion reached by the presiding officer, namely, that it is not always necessary to take a representative sample to prove a violation of the PCB regulations, was also reached in two recently issued final decisions. See In re Electric Service Company, TSCA Appeal No. 82-2, Final Decision dated January 7, 1985; and In the Matter of Robert Ross & Sons, Inc., TSCA Appeal No. 82-4, Final Decision dated April 4, 1984.

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Complainant followed appropriate analytical techniques in analyzing the sample to determine its PCB concentration. Respondent also argues that the presiding officer's denial of its motion to reopen the hearing was an abuse of discretion.[6/] All the

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6/ The presiding officer concluded that Respondent's evidence was "largely cumulative" and, therefore, "cannot support a motion to reopen the record." Decision Denying Motion at 26. See 40 CFR §22.28(a), Motion to Reopen Hearing. I would also emphasize that Respondent failed to "show good cause why such evidence was not adduced at the hearing" as required by the regulations governing this proceeding. See 40 CFR §22.28(a) and discussion in the Decision Denying Motion at 21-22.

arguments raised by Respondent on appeal were raised below and were thoroughly considered and rejected by the presiding officer. I do not agree that the presiding officer erred in his determinatons or that he abused his discretion in denying the motion to reopen. The initial decision is, therefore, affirmed. All findings of fact, conclusions of law and reasons therefor in the initial decision are adopted and incorporated by reference in this final decision.[7/]

7/ That an appellate administrative tribunal may adopt the findings, conclusions, and rationale of a subordinate tribunal without extensive restatement is well-settled. United States v. Orr, 474 F. 2d 1365 (2d Cir. 1973); Carolina Freight Carrier Corporation v. United

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Footnote No. 7 continued:

States, 323 F. Supp. 1290 (W.D.N.C. 1971); In re Electric Service Company, TSCA Appeal No. 82-4, Final Decision (January 7, 1985); In re Chemical Waste Management, Inc., RCRA (3008) Appeal No. 84-8, Order Adopting the Presiding Officer's Initial Decision as Final Agency Action (September 5, 1984); and cases cited in Ciba Geigy v. Farmland Industries, FIFRA Comp. Dkt. Nos. 33, 34 and 42 (Op. of the Judicial Officer, April 30,1981).

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Final Order

The initial decision of the presiding officer is adopted as the Agency's final decision. A civil penalty of $15,000 is assessed for failure to mark a PCB container, $15,000 for failure to have a Spill Prevention Control and Countermeasure (SPCC) Plan and $10,000 for failure to maintain records of each batch of PCBs added to the container. 40 CFR §§761.20(a)(1), 761.42(c)(7)(ii) and 761.42(c)(8). The total civil penalty assessed is therefore $40,000.

Payment of the full amount of the civil penalty ($40,000) shall be made within sixty (60) days of service of this final order, unless otherwise agreed to by the parties. A cashier's check or certified check payable to the Treasurer,

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United States of America, for the full amount, shall be forwarded to the Regional Hearing Clerk.

So ordered.

/s/ Paulette Wolfson for

Ronald L. McCallum
Chief Judicial Officer (A-101)

Dated: Feb 28 1985

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Final Decision In the Matter of Noble Oil Company, TSCA Appeal No. 84-2, were sent to the following individuals in the manner indicated:

By 1st Class Mail,

Postage Prepaid:

Alan G. Kelley, Esq.
Greenberg, Kelley & Prior
196 West State Street
Trenton, NJ 08608

William E. Sawyer, Esq.
Office of Regional Counsel
U.S. EPA, Region II
26 Federal Plaza
New York City, NY 10278

Ms. Cynthia Pabon
Regional Hearing Clerk

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U.S. EPA, Region II

26 Federal Plaza, Room 908

New York City, NY 10278

By Hand

Delivery: Spencer T. Nissen

Administrative Law Judge

U.S. EPA Headquarters

401 M Street, S.W.

Washington, DC 20460

Bessie Hammiel

Hearing Clerk

U.S. EPA Headquarters

401 M Street, S.W.

Washington, DC 20460

/s/ Eileen J. Barnhardt for

M. Gail Wingo

Secretary to the Chief

Judicial Officer

Dated: Feb 28 1985

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 85-3175

IN THE MATTER OF:

N.O.C., t/a NOBLE OIL COMPANY,

Petitioner

v.

ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

On Petition For Review of Final Action by the Administrator of the Environmental Protection Agency

Argued December 5, 1985

Before: ADAMS, Acting Chief Judge, GIBBONS and STAPLETON, Circuit Judges

Appendix D

JUDGMENT ORDER

After considering the contentions raised by petitioner, it is

ADJUDGED AND ORDERED that the final order by the Administrator of the United States Environmental Protection Agency be and is hereby affirmed.

Costs taxed against petitioner.

BY THE COURT,

/s/ Arlin M. Adams

Acting Chief Judge

ATTEST:

/s/ Sally Mrvos

Sally Mrvos, Clerk

DATED: DEC 11 1985